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Supreme Court, U.S.
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No. 02-1230

In The

Supreme Court of the United States

CRAIG LYNN RANG,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Fifth Circuit Court Of Appeals will be permitted to continue using a pretext-plus analysis in employment discrimination cases despite this Court's having expressly overruled and repudiated such an analysis in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

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THE FIFTH CIRCUIT CONTINUES TO USE A PRETEXT-PLUS ANALYSIS

Citing *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2002), the Fifth Circuit stated in *Rang v. Schlumberger*:

> that a plaintiff can avoid summary judgment in an age discrimination case only if the evidence: (1) creates a factual issue as to whether each of the employer's stated reasons was what actually motivated the employer; *and* (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complaints[sic]). (Emphasis added).

(See Pet'r. App. at A2).

The use of the conjunction **"and"** in the quotation above shows the Fifth Circuit employing its *Vadie* analysis continues to require an employment discrimination plaintiff, such as Rang, to do something more than show that each of the employer's reasons is false to establish pretext.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000) states, "that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Disregarding *Reeves*, the Fifth Circuit continues to use the pretext-plus analysis. *Vadie*, at 373 states:

> Viewing the evidence as a whole, as we must, there is nothing probative anywhere in the record of the ultimate question of national origin discrimination. Dr. Vadie argued that Dr. Zappi, who had no teaching experience, was not qualified for the 1995 position and was certainly no match for Dr. Vadie's own record of success in researching and teaching. He further asserted that when MSU advertised for the 1993 positions, a Ph.D. in chemical engineering was not required and that the addition of such a requirement for the 1995 position was pretextual.

> **We will assume, of course, that this was believed by the jury. All that it proves, however, is that [defendant's] decision-makers had some unidentifiable reason for not wanting to hire Dr. Vadie. The evidence has no probative value with respect to the ultimate question before the jury of whether there was discrimination based on national origin and an essential element for Dr. Vadie to prove. There is simply not a scintilla of evidence that Dr. Vadie's national origin played any role in any decision that the defendant made with respect to him during his tenure.** (Emphasis added).

This analysis which the Fifth Circuit uses as its measure for whether a jury question is presented in an employment discrimination case is a direct contradiction of *Reeves*.

Under the *Vadie* analysis the Fifth Circuit will not permit an employment discrimination plaintiff, such as Rang, to establish the ultimate fact of intentional discrimination by simply establishing a prima facie case and disproving each of the employer's asserted reasons for its adverse employment decision. Under *Vadie*, the plaintiff is required to offer some additional evidence "to create a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." (See Pet'r. App. at A2).

RANG DISPROVED EACH REASON ASSERTED FOR HIS TERMINATION

Peters (Rang's manager) testified:

MR. HASH: He's asking you for any and all possible things. I want you to take your time and think about it.

MR. PHIPPS: Off the record.

(Off-the-record discussion).
MR. HASH: I want you to take your time. He's asking for every possible reason, so you need to take your time and think about your answer.
Let's go off the record for a minute while you review that.
(Recess from 5:37 to 5:45).
Q (By Mr. Phipps) We were asking a question about what factors did you use in – no?
MR. PHIPPS: Could you go back and read back the question.
(The requested testimony was read back as follows:
"QUESTION: What do you attribute to the reason why these objectives were not met for the year 1998?")
MR. PHIPPS: And then he said . . .
(The requested testimony was read back as follows:
"ANSWER: Several factors. One, a drop in oil price caused drilling activity to back off, which certainly hurts your ability to keep the same amount of work.
"Secondly is total lack of initiative to do anything about it or to get out and see customers.
"QUESTION: Anything else?"
A **No.** I mean, the only thing I could do is expound on those a little more. But just basic lack of activity, to just blame others for his problems and not actively pursue trying to do something about it. It made his results that much worse. (Emphasis added). . . .
Q Because I look at total lack of initiative

8 and/or seeing customers as really two factors and not
9 one. Can we do that?
10 A Sure.

(R.1868-1867 [Peters Dep., pp.251-254]).

Peters identified two reasons. Despite caution from his counsel, when asked if there were any more reasons, he stated, "No". Peters testified that the way he reflected Rang's "total lack of initiative to do anything about it or to get out and see customers" on Rang's evaluation was by noting that Rang needed development in "creativity" and "initiative" as well as "short term planning". (R.1865, p.261 Ll.9-25).

Rang fully addressed: 1) "total lack of initiative to do anything about it ["the drop in oil price which caused drilling activity to back off, which certainly hurts your ability to keep the same amount of work", i.e., maintain the market share]"; 2) "to get out and see customers"; reflected in a) "creativity"; b) "initiative"; c) "short term planning"; and d) "blamed others for his problems" in his Petition for Certiorari. (See Pet'r. Bf. pages 18-24). Each and every reason offered by Peters for rating Rang's job performance a "D" and selecting his employment to be terminated is unworthy of credence.

Now, for the first time, Schlumberger offers additional reasons for Peters' decision to select Rang's employment to be terminated in the 1999 RIF. Schlumberger now asserts Peters rated Rang's performance a "D" because Rang missed his sales and marketing objectives. However, by Peters' own calculation, as written on Rang's performance appraisal, Rang's overall marketshare increased by 11%. Schlumberger had never had a marketshare this large in the Williston Basin before. In the two previous years, for a lesser increase in his marketshare, ELA, Schlumberger awarded Rang merit raises based on his competitive performance. (R.938-39).

Additionally, the entire Rocky Mountain Division missed its sales and marketing objectives.[1] While Rang increased his market share by 11%, his revenue was off due to a decline in drilling activity and the corresponding price cutting that ensued. Like the other members of the sales team, Rang had no control over the decline in drilling activity and Schlumberger's corresponding price cutting. (R.1141).

Additionally, Gary Riley who retired in July, 1998, former West Coast Division Sales Manager, testified that giving Rang objectives on September 21, 1998 calling for an increase in each of his objectives in the face of rapidly deteriorating oil field activity was unreasonable. He added that under Schlumberger's procedures Peters was required to sit down with Rang and consult about the objectives before they were set which Peters failed to do. (R.1144, 1141).

Unlike Rang, *Scott* Riley received his performance objectives at the beginning of the year.[2] In contrast, Rang received his objectives in late September 1998 and had little chance of meeting all of them.[3]

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[1]

"Team Objectives" for 1998	Results
1. Rockies OFS Revenue > $135,057K	$119,800K
2. NWA W&T Revenue > $120,600K	$101,000K
3. Rockies W&T Revenue > $36,500K	$31,814K

[2] Schlumberger's Appellee Brief, page 5, states:

> . . . Peters determined that **three** individuals would need to be laid off from **his group** in order for him to meet the numbers required for the reduction in force. Therefore the **three individuals chosen by Peters** for layoff were *Scott* Riley, age 36, Kirk Schmidt, age 30, and Craig Rang.

Schlumberger placed its termination of *Scott* Riley's employment, and its subsequent **rehire offer to him (R.1134, 1133)**, at issue in this litigation by admitting to the District Court in its memorandum supporting its motion for summary judgment that *Scott* Riley, "a Wireline Sales Engineer in California" was Rang's "most direct comparator" (R.919).

[3] Peters **denied** at his deposition that he had input into the management, job performance appraisal, forced ranking, or employment

(Continued on following page)

Among Schlumberger's new assertions is that Rang's performance was poor, because he did not present papers as per his 1998 objectives.[4] Rang's objectives did not include presenting papers; however, on his own initiative Rang conducted nine formal seminars for his clients where papers were discussed. (R.1423-22).

Peters directed Rang to write and publish a technical paper in late September 1998.[5] Rang could not possibly have written and secured review and approval of a technical paper in so short a time. Gary Riley, a former Division Sales Manager testified about the unreasonableness of such an objective with most of the year having already elapsed.

Schlumberger also asserts here that Rang admitted he failed to sell "key services". Schlumberger makes a bald assertion that Rang has admitted to something but fails to provide citation to the alleged admission. Rang's deposition, page 162 (R.1267, 981-980, par.38-39) reveals:

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termination decision affecting *Scott* Riley. "No, I never supervised him". "Since I never supervised him, the answer would be no [I never evaluated him]." (R.1918, 1838 [Peters Dep., pp.52, 365]).

The District Court ordered Schlumberger to produce *Scott* Riley's personnel file, including his 1999 "Performance Appraisal and Development Plan". Schlumberger would not produce *Scott* Riley's 1999 "Performance Appraisal and Development Plan". However, *Scott* Riley provided his appraisal and disclosed that he had received his objectives **at the beginning of 1998** for his 1999 "Performance Appraisal and Development Plan". *Scott* Riley had the entire year within which to attempt to meet his objectives. (R.1134, par.2, 1133, 1131) (Record Excerpt #11).

[4] The Society of Petroleum Engineers' Distinguished Lecturer Committee invited Rang to serve as a "Distinguished Lecturer" for 1998-99. Because of Rang's recognized expertise the SPE suggested he lecture on the topic, "Integration of Dynamic Data." The lectures were scheduled between September of 1998 and May 1999. The SPE had in place an expense reimbursement policy. Peters denied Rang's request for permission to accept the invitation. (R.996, 966, par.83).

[5] Peters evaluated Rang in January, 1999.

> Q: Mr. Hash: "Okay. So basically, you don't believe you could sell any of the key services during this time of dropping oil prices?"
>
> A: Mr. Rang: "Oh, we [I] sold a lot of key services, but a lot of the services weren't put on here. We were [I was] selling FMI, FMSs, formation microscanners, formation microimagers. We were doing a lot of high tech work." . . . "they didn't put those high tech services on here [referring to the 1999 SLP-3e]."

Schlumberger's Opposition Brief also states that "Key Services" are "new technology"; however, these terms are not synonymous. Gary Riley, retired former West Coast Division Sales Manager, testified:

> "8. . . . I should note here that 'New Technology' and 'Key Services' are not necessarily synonymous. Some of the 'Key Services' have been around for 15-20 years." (R.1140, par.8, Rang Record Excerpt #10).

Even Peters testified that the term "Key Services" includes old technology. (R.1880-79, Dep. pp.204-05). Moreover, Peters testified that "a key way of making money in open hole [ES] is to run 'Key Services' up." (R.1850 [Peters Dep. p.317 Ll.24-25]). Yet Peters admitted in Rang's 1999 "Performance Appraisal and Development Plan" that Rang had "sew[n] up the ES Market". (R.1557, 980 par.39). The record shows Rang sold lots of "Key Services".

Peters testified he traveled (4 or 5 times) to Montana for joint sales calls with Rang during which certain statements were made indicating Rang was not calling on his clients. Rang provided affidavits from the clients Peters visited stating that the statements Peters claimed they made were never made. (See Peters' testimony, Pet'r. Bf. at p.19). Now Schlumberger, without any citation or quotation, argues that Peters' quoted testimony is not what he said. For the first time, Schlumberger now argues Peters stated Rang was not calling on all 40 of his clients. In fact, Peters did not know how many clients were in the

Williston Basin, the area Schlumberger assigned to Rang. Peters testified:

> Q: How many rigs drill up there in the Williston basin, back in January 1999 and December of 1998?
>
> A: I have no clue.
>
> . . .
>
> A: If you had 40 [rigs], it would be anywhere between 1 and 40 [clients].

(R.1868-69, Dep. pp.287-88). From Peters' hypothesis, Schlumberger now states Rang's performance was poor because he was not calling on all 40 hypothetical clients. However, the record shows Peters had no idea how many clients were available for Rang to call on, nor did Peters travel beyond the immediate Billings, Montana area to see them. The significance of the clients' affidavits is not their numbers but that they show Peters' mendacity.

RANG DID NOT BASE HIS AGE CLAIM ON LONGEVITY OF SERVICE NOR BASE HIS PRETEXT EVIDENCE ON MERE SUBJECTIVE BELIEF

Schlumberger has a competitive job performance-based system with highly developed job grade/classifications. Based on written job descriptions, Schlumberger's sales engineers have three grades: 12 (Sales Engineer), 13 (Senior Sales Engineer), and 14 (Sales Development Engineer). These grades are based on performance factors, not longevity of service. The job grade/classification criteria are objective, not subjective.

Rang has never claimed that he was better qualified than certain younger employees who were retained at the time of the RIF decision based on longevity of service. Rang has asserted, based on Schlumberger's own objective job grade/classifications, that as a Grade 14, Sales Development Engineer (the highest grade of sales engineer at Schlumberger) he was objectively more qualified than

certain younger sales engineers who held a lower job grade/classification and were retained.

Gary Riley, Schlumberger's retired West Coast Sales Manager, examined the job grade/classification information, performance appraisals used in the forced-ranking by Peters, and Peters' deposition among other materials (R.1141). Gary Riley testified Schlumberger policies and procedures were not followed in providing Rang with his performance objectives, or in conducting the forced-ranking, and that Peters included four noncomparable employees in the forced-ranked group (R.1139-38). Based on Gary Riley's review of objective criteria – the job grade/classifications and comparative written work performance appraisals of employees against whom Peters ranked Rang – Gary Riley testified, Rang was "much better qualified" than certain younger employees who were retained. (R.1138). Schlumberger did not refute Gary Riley's testimony, and admitted that Gary Riley is a "trustworthy fellow". (R.1387).

Peters testified Rang was qualified for the position he held at Schlumberger, Sales Development Engineer, **Grade 14**, when Schlumberger terminated his employment. Thus, by Schlumberger's own objective criteria, Rang was objectively "clearly better qualified" than: Corbett (age 38, Grade 13, Sr. Sales Eng.), Gunter (age 28, Grade 12, Sales Eng.), Miller (age 42, Grade 12, Sales Eng.), and Sieben (age 36, Grade 12, Sales Eng.) and qualified for, field, sales, and district positions, Grade 14 or below (R.1138).[6]

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[6] In *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 995 (5th Cir. 1993) and *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996), the plaintiffs provided subjective opinions about their relative qualifications. In contrast, Rang offered specific and objective evidence showing that he was "clearly better qualified" than certain younger employees Schlumberger retained.

While Schlumberger's Brief disparages "Wildcatter Awards", they are highly coveted at Schlumberger and not easily obtained. In 1997, Schlumberger recognized Rang's job performance with two "Wildcatter Awards" and noted that receipt of these awards was excellent (R.2134, 1498). Rang testified he was selected to receive another "Wildcatter Award" for his work in 1998 and was told he would receive the award at a ceremony in 1999; instead, his employment was terminated.

Peters was 39 when he selected Rang to be RIFed. (R.1928, 1926, 1916). Emich who took over Rang's duties was 41. (R.1760-59).

Schlumberger maintained in the Fifth Circuit that Rang sought "to establish pretext by relying upon the post-reduction in force treatment of Scott Riley and Kirk Schmidt." (Appellee Brief, p. 15). Now, before this Court, Schlumberger says Rang is complaining that he was entitled to a preference because of years of service. Rang makes no such claim.

CONCLUSION

Rang seeks a correct application of *Reeves* in this matter and proper consideration of the pretext evidence he presents which rests on specific objective criteria. Schlumberger has neither abundant nor independent evidence of the type which would allow this case to fall within the *Reeves* exception. This Honorable Court should grant Certiorari. Discrimination plaintiffs within the Fifth Circuit must be governed by *Reeves*, rather than *Vadie*.

Respectfully submitted,

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